

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SUSANNA MIRKIN and BORIS MIRKIN,
Individually and on Behalf of All Others
Similarly Situated,

Plaintiffs,

v.

XOOM ENERGY, LLC and XOOM ENERGY
NEW YORK, LLC,

Defendants.

No. 18 Civ. 2949 (ARR) (JAM)

[PROPOSED] ORDER ON XOOM'S MOTIONS IN LIMINE

The Court, having considered XOOM's Motions *in Limine*, Plaintiff's responses, XOOM's replies, and the arguments of counsel, if any, is of the opinion that XOOM's Motions *in Limine* should be **GRANTED** as follows:

1. **MIL No. 1: The Court should prohibit Plaintiff from offering evidence or argument that XOOM breached any implied contract term, including the implied covenant of good faith and fair dealing.**

GRANTED _____

DENIED _____

2. **MIL No. 2: The Court should prohibit Plaintiff from offering evidence or argument that an implied or unwritten rate cap exists in Plaintiff's or the Class's contracts.**

GRANTED _____

DENIED _____

3. **MIL No. 3: The Court should prohibit Plaintiff from offering evidence or argument that XOOM's variable rates or variable-rate margins were unreasonable.**

GRANTED _____

DENIED _____

4. **MIL No. 4: The Court should prohibit Plaintiff from offering evidence or argument of XOOM's fixed rates or fixed-rate margins.**

GRANTED _____

DENIED _____

5. **MIL No. 5: The Court should prohibit Plaintiff from offering evidence or argument of any proposed "exemplar margin."**

GRANTED _____

DENIED _____

6. **MIL No. 6: The Court should prohibit Plaintiff from offering evidence or argument suggesting that a particular variable rate or variable-rate margin was profitable for XOOM, or that an alternative rate or margin would have been profitable.**

GRANTED _____

DENIED _____

7. **MIL No. 7: The Court should prohibit Plaintiff from offering evidence or argument relating to the rates and margins of other ESCOs, including: rates charged by other ESCOs; costs incurred by other ESCOs; margins achieved by other ESCOs; and how XOOM's rates, costs, or margins compared to those of other ESCOs.**

GRANTED _____

DENIED _____

8. **MIL No. 8: The Court should prohibit Plaintiff from offering evidence regarding regulated utility rates, including: rates charged by regulated utilities; costs incurred by regulated utilities; margins achieved by regulated utilities; and how XOOM's rates, costs, or margins compared to those of regulated utilities.**

GRANTED _____

DENIED _____

9. **MIL No. 9: The Court should prohibit Plaintiff from offering evidence regarding contracts that do not include the same pricing term as Plaintiff's contract.**

GRANTED _____

DENIED _____

10. **MIL No. 10: The Court should prohibit Plaintiff from offering expert evidence regarding the meaning of contract terms.**

GRANTED _____

DENIED _____

11. **MIL No. 11: The Court should prohibit Plaintiff from offering evidence or argument regarding or referring to NRG Energy Inc. or any other non-party affiliated with XOOM.**

GRANTED _____

DENIED _____

12. **MIL No. 12: The Court should prohibit Plaintiff from offering evidence or argument related to the PSC's 2019 Reset Order, or any other proceedings or filings before regulatory and legislative bodies.**

GRANTED _____

DENIED _____

13. **MIL No. 13: The Court should prohibit Plaintiff from seeking or referring to punitive damages and from referencing a "deceptive advertising" theory.**

GRANTED _____

DENIED _____

14. **MIL No. 14: The Court should prohibit Plaintiff from introducing deposition testimony from available witnesses as part of her case in chief.**

GRANTED _____

DENIED _____

15. **MIL No. 15: XOOM should be permitted to redact from any party or joint trial exhibit its trade-secret information that the Court excludes.**

GRANTED _____

DENIED _____

IT IS SO ORDERED.

Dated: _____

HON. ALLYNE R. ROSS
UNITED STATES DISTRICT JUDGE